(25)

Office - Supreme Court, U. S.
FILED
NOV 10 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 700

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,

vs.

PEORIA LIFE INSURANCE COMPANY, A CORPORATION.

IN THE MATTER OF THE CLAIMS OF: MARGARET HARWICK, ASSIGNEE OF HUGH E. VAN DE WALKER; FIDELITY & DEPOSIT COMPANY OF MARYLAND, ASSIGNEE OF GEORGE C. BERRA; T. A. CURNOW; THOMAS E. ROGERS; EDWIN B. SEIDEL; C. H. DELONG; AND W. H. LOGAN,

Petitioners,

vs.

CHARLES V. O'HERN, AS RECEIVER, AND TIMOTHY W. SWAIN, AS SUCCESSOR RECEIVER, OF PEORIA LIFE INSURANCE COMPANY, A CORPORATION, AND ALLIANCE LIFE INSURANCE COMPANY, A CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

FERRE C. WATKINS,
HOWARD WHITE,
Attorneys for Timothy W. Swain, Receiver.

DONALD R. RICHBERG,
D. I. JARRETT,
GEORGE Z. BARNES,
GEORGE W. HUNT,
DAVID J. KADYK,
Attorneys for Alliance Life Insurance Company.

THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST MONROE, CHICAGO

SUBJECT INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Argument	10
Conclusion	18
Appendix	19

Table of Authorities Cited.

CASES.

Bethke v. Grayburg Oil Co., 89 F. (2d) 536, 539..... 12
Blanchard Bro. & Lane v. Gay Co., 289 Ill. 413, 421... 14
Carr v. Hamilton, 129 U. S. 252; 32 L. ed. 669, 670..... 14
Clark v. Williard, 292 U. S. 112, 120; 78 L. ed. 1160, 1165..... 13
Daniel v. Layton, 75 F. (2d) 135, 137..... 16
General American Life Ins. Co. v. Roach, 179 Okla. 301, 65 Pac. (2d) 458 15
Hobbs v. Occidental Life Ins. Co., 87 F. (2d) 380, 384.. 15
International Co. v. Occidental Life Ins. Co., 98 F. (2d) 138, 143-144..... 15
Kammerer v. Kroger, 299 U. S. 302; 81 L. ed. 253..... 11
Martin Emerich Outfitting Co. v. Siegel Cooper & Co., 237 Ill. 610..... 14
People v. Acme Plate Glass Ins. Co., 292 Ill. App. 275.. 14
People v. Davies, 354 Ill. 168..... 10
People v. Niehaus, 356 Ill. 104..... 5
People v. Peoria Life Ins. Co., 357 Ill. 486.....5, 14
People v. Peoria Life Ins. Co., 303 Ill. App. 430.....9, 10
Ward v. Farwell, 97 Ill. 593, 618..... 10

TEXTS.

2 Restatement of Contracts, sec. 458..... 14

STATUTES.

Illinois Liquidation Act, 1925, Cahill Ill. Rev. Stat. 1933, Chap. 73, par. 105 (2), 105 (4), 105 (11).....3, 10
U. S. Judicial Code, Act of Feb. 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937 (U. S. C. A. Title 28, Sec. 344)..... 2

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 700.

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,

vs.

PEORIA LIFE INSURANCE COMPANY, A CORPORATION.

IN THE MATTER OF THE CLAIMS OF: MARGARET HARWICK, ASSIGNEE OF HUGH E. VAN DE WALKER; FIDELITY & DEPOSIT COMPANY OF MARYLAND, ASSIGNEE OF GEORGE C. BERRA; T. A. CURNOW; THOMAS E. ROGERS; EDWIN B. SEIDEL; C. H. DELONG; AND W. H. LOGAN,

Petitioners,

vs.

CHARLES V. O'HERN, AS RECEIVER, AND TIMOTHY W. SWAIN, AS SUCCESSOR RECEIVER, OF PEORIA LIFE INSURANCE COMPANY, A CORPORATION, AND ALLIANCE LIFE INSURANCE COMPANY, A CORPORATION,

Respondents.

Brief for Respondents in Opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW.

The judgment and opinion of the Supreme Court of Illinois involved is reported in 376 Ill. 517. That court affirmed the judgment of the Appellate Court for the Second District of Illinois, whose opinion is reported in 303 Ill. App. 430.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered on April 15, 1941 (R. 341, 342), rehearing denied June 12, 1941 (R. 403). Time for filing petition for writ of certiorari was extended to and including October 13, 1941, by an order of an Associate Justice of the Supreme Court of the United States entered September 5, 1941 (R. 408, 409). Petition for writ of certiorari was filed October 13, 1941, and notice thereof served on respondents on October 21, 1941.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. C. A. Title 28, Section 344).

Questions Presented.

1. Whether, in a proceeding for the liquidation of the Peoria Life Insurance Company, in which petitioners as former agents of the insolvent company filed their claims, presented evidence, and were heard as to the merits thereof by the same court in which the liquidation proceeding was pending, resulting in an allowance in part and a denial in part of their claims, petitioners were deprived of property rights without due process of law, contrary to Article XIV of the amendments to the Constitution of the United States.

2. Whether petitioners, in being denied recovery of commissions in respect of premiums falling due and paid after November 15, 1933, to the receiver of the Peoria Life Insurance Company and the Alliance Life Insurance Company, were deprived of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

Statutes Involved.

The pertinent provisions of the Illinois Insurance Liquidation Act of 1925, as amended in 1929 (Ill. Rev. Stat. 1933, Chap. 73, Secs. 105 (2), 105 (4)), are as follows:

105 (2). "Whenever any resident company (a) is insolvent * * * (k) on consent of a majority of the directors, stockholders or members of such resident company, then the director shall report any such case to the Attorney General of this State whose duty it shall be to apply forthwith by petition of the director in the name of the People of the State of Illinois to the Circuit Court of the county in which the principal office of such company in this State is located for an order directing such company, upon such notice as the Circuit Court may prescribe, to show cause why a receiver should not be appointed as hereinafter set forth to take possession of its property and conduct its business, and for such other relief, as the nature of the case and the interests of its policyholders, creditors, members, stockholders or the public may require.

* * * * *

105 (4) "If * * * the court shall order the liquidation of the business of such company, such liquidation shall be made by and under the direction of such receiver, who * * * shall be vested by operation of law with title to all of the property, contracts and rights of action of such company as of the date of the order so directing liquidation. * * * The rights and liabilities of any such company, and of its creditors, policyholders, stockholders and members, and of all other persons interested in its assets, shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order directing the liquidation of such company. * * *"

STATEMENT.

The Facts Summarized.

On November 15, 1933, the Circuit Court of Peoria County, Illinois, entered its order for the liquidation of the Peoria Life Insurance Company, insolvent, and directing the receiver to proceed to liquidate the company forthwith, all in accordance with the Illinois Insurance Liquidation Act of 1925. In the course of liquidation, a decree was entered August 22, 1934, approving the reinsurance of policies whose holders consented on terms provided in an agreement with the Life and Casualty Company whose name was later changed to Alliance Life Insurance Company (R. 49). All persons having claims against the assets of the Peoria Life Insurance Company were required to file proofs of claim within ninety days. The petitioners herein filed their claims for commissions on premiums paid to the Peoria Life Insurance Company prior to November 15, 1933, which claims were allowed, and filed claims for commissions on premiums paid to the receiver (and by him to the Alliance) or paid to the Alliance, which claims were disallowed.

The petitioners herein then appealed from the order of the Circuit Court disallowing their claims, first, directly to the Supreme Court of the State of Illinois, alleging the same constitutional question that is made the basis of the present petition. The Supreme Court of Illinois ordered the case transferred to the Appellate Court on the ground that no constitutional question was involved. The Appellate Court affirmed the Circuit Court and then, upon appeal from the Appellate Court, the Supreme Court affirmed the judgment of the Appellate Court. A detailed statement of facts with appropriate references to the record follows.

The Facts in Detail.

The People of the State of Illinois, *ex rel.* Ernest Palmer, Director of Insurance of the State of Illinois, on November 15, 1933, filed their petition in the Circuit Court of Peoria County, Illinois, alleging impairment of the capital and reserves and praying for an order to show cause to be directed to the Peoria Life Insurance Company, Peoria, Illinois, why an order should not be entered finding that sufficient cause existed for liquidation of the business and affairs thereof, and after hearing thereon for an order of liquidation (R. 43).

On the same day the respondent company entered its appearance and consented to the immediate entry of an order, and the court, after hearing, entered its order that the receiver, when appointed pursuant to the statute of Illinois, "immediately take possession of the books, records, property, assets, and affairs of the said defendant corporation, and proceed to liquidate the same forthwith." (R. 245-248.)

Pursuant to said statute the Director of Insurance, on November 15, 1933, appointed the Receiver (R. 248-249), who immediately took possession and proceeded to liquidate the affairs of said company and is now so acting.

In two cases arising out of the liquidation proceeding the Supreme Court of Illinois decided that the receiver was a statutory receiver vested by operation of law with title to all the assets of the insolvent company and not a receiver by appointment of the court (*People* v. *Niehaus*, 356 Ill. 104, 112), and that the receiver as a liquidating officer, not the Circuit Court, had power, under the Illinois statute, to liquidate the business and affairs of the insolvent company. (*People* v. *Peoria Life Ins. Co.*, 357 Ill. 486, 491.)

On July 20, 1934, the receiver filed his inventory, his report of steps taken by him, copies of proposals received

by him from going insurance companies and from others, together with his recommendations, and asked that the court confirm his acts, fix a date for filing of claims, and provide for notice thereof. On August 22, 1934, the Circuit Court, after full hearing, entered its decree (R. 45), specially finding (1) That the receiver had given notice of that hearing to parties in interest of record, and (2) That the reinsurance agreement of the Alliance Life Insurance Company recommended by the receiver, "in its final form is in accord with the plan of liquidation adopted by the said receiver pursuant to the statute in such cases made and provided and concurred in by the Director of Insurance." (R. 46.) The Court decreed and ordered:

(a) That the report and recommendation of the receiver respecting the reinsurance agreement be approved and confirmed (R. 46).

• • • • •

(d) That the receiver mail to all insureds named in Peoria Life Insurance Company policies in force as of November 15, 1933, a printed copy of the agreement when executed (R. 46).

(e) That all agents' contracts be disaffirmed as of November 15, 1933, the date of the entry of the order of liquidation and receivership (R. 46).

(f) That the receiver file a further report within ninety days (R. 46).

(g) That the receiver ascertain by appraisement the fair cash market value of the assets of the insolvent Peoria Life Insurance Company (R. 47).

(h) That dissenting policyholders file their claims with the receiver as of November 15, 1933, and that every policyholder who does not dissent be bound as having assigned all his claims against the Peoria Life Insurance Company to the Alliance in consideration of the Alliance's assuming insurance protection for said assenters (R. 47).

(i) and (j) That all creditors, whether policyholders or not, within ninety days, file written proofs of their respective claims or demands with the receiver (R. 47).

(k) That the Alliance file a claim for the amount of all claims assigned to it (R. 47).

(l) That the receiver give public notice to all persons having or asserting any claim or demand against the Peoria Life Insurance Company, or having any equitable interest in the assets of the receivership estate (R. 47).

• • • • •

(n) That the receiver make a report of claims filed, with his recommendations for allowance, and providing for objections and contest by the claimants and the receiver and adjudication by the court (R. 48).

(o) That objections to the appraisement may be filed and heard (R. 48).

• • • • •

(r) That the court reserves general jurisdiction to exercise all powers and perform all such functions as it may lawfully do under the Illinois statute entitled "An Act in Relation to Delinquent Insurance Companies, Associations, and Societies" approved June 26, 1925, and to determine all claims and demands filed with the receiver and the manner of distribution of all assets or property now or hereafter coming into the possession of the receiver (R. 48).

The foregoing liquidating orders were subsequently complied with by the receiver and by the Life and Casualty Company, thereafter named Alliance Life Insurance Company. Many persons, firms, and corporations filed claims with the receiver, in accordance with the order. Among those claimants were the petitioners, who filed their claims within the period of ninety days, as required by the de-

cree (R. 42, pp. 166-169). Petitioners' claims in respect of commissions on premiums paid to the Peoria Life Insurance Company prior to November 15, 1933, were recommended for allowance by the receiver, but their claims in respect of commissions on premiums paid to the receiver and by the receiver to the Alliance and on premiums paid to the Alliance were recommended for disallowance. Although the receiver believed he had no jurisdiction of premium payments made after the liquidation order of November 15, 1933, he did receive some such monies which he held in a special fund for whatever benefit might accrue to such payers (R. 250). Those monies were never received by the Peoria Life Insurance Company nor were they commingled with the Peoria Life assets. When the agreement between the receiver and the Alliance was approved, the monies paid by a dissenter to the agreement were returned in full to him, but the monies paid by assenters to the agreement were paid by the receiver to the Alliance as premium payments for the new insurance provided by the Alliance (R. 214, 215, p. 1254).

The trial court, after extended hearings upon the original claims and upon subsequent amended claims filed by petitioners, confirmed the recommendations of the receiver that petitioners' claims be allowed for commissions on premiums paid to the Peoria Life before the liquidation order of November 15, 1933. The petitioners in due course received their pro rata shares as dividends on the allowed claims, as did all other creditors (R. 214, p. 1252). Their claims for commissions on premiums paid after the liquidation order were disallowed (R. 224, pp. 1274, 1275).

The petitioners appealed from the order of the Circuit Court disallowing their claims for commissions on premiums paid to the Alliance after November 15, 1933. They appealed directly to the Supreme Court of the State of Illinois, alleging the same constitutional question now

urged in this Court. When this matter came before the Supreme Court of Illinois on the 17th day of October, A. D. 1938, the court found and adjudged that the case was wrongfully appealed to the Supreme Court of Illinois and ordered that the case be transferred to the Appellate Court of the Second District of the State of Illinois (Appendix; 303 Ill. App. 430, 433). The case was heard by the Appellate Court, Second District of Illinois, and the decision of the trial court was affirmed.

The petitioners appealed from the Appellate Court to the Supreme Court of Illinois, assigning as error that the Appellate Court refused to consider constitutional errors previously urged on their attempted direct appeal to the Supreme Court. The judgment of the Appellate Court was affirmed, from which petitioners now seek a writ of certiorari from this Court.

ARGUMENT.

I.

PETITION RAISES NO SUBSTANTIAL FEDERAL QUESTION.

1. There is no substantial federal question presented by the present petition. The petitioners have had their day in court with proper notice and opportunity to be heard upon their claims. They were not proper or necessary parties to the statutory proceeding of the People of the State of Illinois against the Peoria Life Insurance Company, filed November 15, 1933. (*Ward* v. *Farwell*, 97 Ill. 593, 618.) They claim no right to be heard in that proceeding, in which the liquidation of the Peoria Life Insurance Company was ordered. Although they had no prior notice of the entry of the decree on August 22, 1934, they had ample notice of the requirements of that decree as to presenting proofs of claim. They did present their claims to the court, which entered the order of liquidation of November 15, 1933, and decree of August 22, 1934, approving the receiver's plan of liquidation. Their claims against an insolvent estate have been adjudicated by the court, which has a statutory jurisdiction to adjudicate such claims. (Ill. Rev. Stat. 1933, Ch. 73, par. 105 (11).) The merits of petitioners' claims have been reviewed by the Appellate Court and the Supreme Court of Illinois, including their contentions that questions of constitutionality were involved. (Decided adversely when the Illinois Supreme Court transferred the cause to the Illinois Appellate Court. Appendix I and *People* v. *Peoria Life Ins. Co.*, 303 Ill. App. 430, 433. That decision is now final as to claimants. *People* v. *Davies*, 354 Ill. 168.) In substance, petitioners are asking the Supreme Court of the United States to review the decision

of the Illinois Courts, interpreting and applying an Illinois statute, the constitutionality of which is not questioned.

We submit that this does not present a substantial federal question and that the petition should be denied in accordance with the doctrine laid down in *Kammerer* v. *Kroeger,* 299 U. S. 302; 81 L. ed. 253. In that case, petitioners had made a claim against the receiver of a building and loan association in process of liquidation. These claims were denied by the trial court and the judgment sustained by the Court of Appeals and then by the Supreme Court of Ohio. The Supreme Court of Ohio dismissed the appeals on the ground that "no debatable constitutional question was involved," a ruling similar to the action of the Illinois Supreme Court in originally refusing to take jurisdiction of a direct appeal in the present case. This court, in *Kammerer* v. *Kroeger, supra,* held:

> "We find no basis for the contention that in denying appellants' claim to be paid for counsel fees and expenses out of the assets in the hands of the liquidator, upon the ground that the court was without jurisdiction to make such an allowance, any right of the appellants under the federal constitution has been infringed. The question is one of state practice and remedy. The motions to dismiss the appeals are granted and the appeals are dismissed for the want of a substantial federal question."

2. When petitioners claim damages against the receiver because of anticipatory breach of their agency contracts by the failure of the Peoria Company, such claims are based upon the validity of the decree of liquidation entered November 15, 1933. They therefore admit that their contracts were legally terminated on November 15, 1933, and not by the decree of August 22, 1934, of which they now complain. Petitioners claim only that they had no notice of the hearing which resulted in the decree of August 22, 1934. That decree did not in any respect affect

any rights petitioners had, except only that it ordered the receiver to give public notice to all persons, firms, or corporations to file claims within ninety days from the date of the entry thereof. That notice was received by petitioners who thereupon complied with the decree of August 22, 1934, and filed their claims (R. 42, pp. 166-169). Petitioners had many hearings on the subject of their claims, and on March 11, 1938, more than three years after the decree of August 22, 1934, they, by written stipulation, agreed that the issues were presented by their amended claims and pleadings. Those claims are now presented in this proceeding. The Circuit Court of Peoria County gave petitioners a full hearing and adjudicated their rights. Petitioners had review thereof in both the Appellate and the Supreme Courts of the State of Illinois. They must now be estopped to complain that they had no notice. There is, therefore, no basis for the contention of the petitioners that they have been deprived of any rights or property without due process of law. Petitioners cannot now contend that the decree is invalid which they found of record when and pursuant to which they filed their proofs of claim. They took the decree as they found it, since the filing of their proofs of claim is equivalent to intervention. (*Bethke* v. *Grayburg Oil Co.*, 89 F. (2d) 536, 539).

II.

PETITIONERS' REJECTED CLAIMS HAVE NO MERIT.

There is no basis for petitioners' contention that the receiver of the Peoria Life, and subsequently the Alliance Life Insurance Company, received premiums on policies which petitioners sold. Petitioners were agents of the Peoria Life Insurance Company. There were not agents of the Alliance. They contend, however, that their agency contracts with the Peoria Company continued to exist in

spite of the liquidation order of November 15, 1933, and that the policies or contracts of insurance which they sold as agents for the Peoria Life Insurance Company continued to exist in spite of the liquidation order of November 15, 1933. The statute of the State of Illinois is a clear and concise answer to their contentions. Similar statutes have been recognized by this Court.

In the case of *Clark* v. *Williard*, 292 U. S. 112, 120; 78 L. ed. 1160, 1165, this Court said:

> "In our judgment the statutes of Iowa have made the official liquidator the successor to the corporation and not a mere receiver. * * * His title is not the consequence of a decree of a court whereby a corporation still in being has made a compulsory assignment of its assets with a view to liquidation. * * * His title is the consequence of a succession established by the corporation by the law of its creation." (*Relfe* v. *Rundle*, 103 U. S. 22; 26 L. ed. 337, and other cases there cited.)

Rights asserted by petitioners are dependent upon their agency contracts with the Peoria Life Insurance Co.

The parties must be conclusively presumed to have entered into those contracts in contemplation of the possibility of the insurance company's insolvency and its liquidation under the Insurance Liquidation Act of the State of Illinois. (*People* v. *Peoria Life Ins. Co.*, 376 Ill. 517, 521, 522; R. 332.) The Illinois Insurance Liquidation Act provides that when the Circuit Court shall order the liquidation of the business of any company, the title to all of the property, contracts, and rights of action of such company shall vest in the receiver as of the date of the liquidation order, and that the rights and liabilities of any such company and of all persons interested in its assets, shall be fixed as of the date of the entry of the order directing the liquidation of such company (*Supra*, p. 3).

Appointing a receiver to take possession of the assets of a corporation and distribute them is tantamount to dissolving the corporation. (*Blanchard Bro. & Lane* v. *Gay Co.*, 289 Ill. 413, 421.)

In contracts which require the continued existence of a particular person or thing, the destruction or death of that person or thing will terminate the agreement. (*Martin Emerich Outfitting Co.* v. *Siegel Cooper & Co.*, 237 Ill. 610; 2 Restatement of Contracts, section 458.)

When the decree ordering liquidation was entered and the receiver appointed, title to all of the property of the Peoria Life Insurance Company passed to the receiver by virtue of the Illinois Insurance Liquidation Act (*People* v. *Peoria Life Ins. Co.*, 357 Ill. 486), and from that moment the Peoria Life Insurance Company had no further corporate power for any purpose for which it had been organized. The company became *civiliter mortuus*, its business was brought to an absolute end, and the policyholders became creditors to an amount equal to the equitable value of their respective policies, and entitled to participate pro rata in its assets. (*Carr* v. *Hamilton*, 129 U. S. 252; 32 L. ed. 669, 670.) To like effect, the agents and all other persons interested in its assets became creditors to an amount equal to the value, as of the liquidation date, of whatever contracts they had when the contracts ceased. The company could no more employ agents, issue policies of insurance, accept premiums, or pay claims. Every contract which had been made with it was disaffirmed, and every contracting party reduced to such claim as he might have against the receiver. The liquidation proceeding, once begun, could not be abandoned or changed to rehabilitation. (*People ex rel. Palmer* v. *Acme Plate Glass Ins. Co.*, 292 Ill. App. 275.)

The agreement between the receiver and the Alliance Life Insurance Company, which was approved by the de-

cree of August 22, 1934, did not in any way affect petitioners' rights. By that reinsurance agreement the Alliance agreed only to assume contracts of insurance with the former policyholders of the insolvent Peoria Life Insurance company subject to restrictions, limitations and conditions therein stated for and in consideration of the payment to the Alliance by the receiver of the pro rata distributive shares of those former policyholders of the Peoria Company who agreed to be bound by the provisions of the reinsurance agreement. The effect of the agreement was that, with the assets in the hands of the receiver, holders of policies issued by the insolvent Peoria Company acquired new insurance protection. The new protection came from the Alliance. (*Hobbs* v. *Occidental Life Ins. Co.*, 87 F. (2d) 380, 384.) The gist of the decree was to liquidate the property through the live and going insurance company by providing new insurance therewith. (*International Co.* v. *Occidental Life Ins. Co.*, 98 F. (2d) 138, 143-144, cert. denied 305 U. S. 639, 83 L. ed. 412.) There was no liquidation order in the case of *General American Life Ins. Co.* v. *Roach*, 179 Okla. 301, 65 Pac. (2d) 458, relied upon by petitioners.

To assure such policyholder-creditors of the maximum benefits, the agreement provided, by means of an accounting arrangement called the Peoria Life Fund, that profits whether from recovery of asset value or from the usual incidents of the life insurance business such as mortality savings, should inure for a specified period of years to the benefit of those who agreed to the provisions of the agreement and thereby assigned to the Alliance their rights to distributive pro rata shares of the Peoria Company assets. All former policyholders who did not agree could file their claims for their shares with the receiver.

The agreement, while specifically limited to the rights of former policyholders of the Peoria Life Company, also

expressly stated that the Alliance did not agree thereby to enter into any agreements with former agents, supervisors, managers, etc., of the Peoria Company. Petitioners therefore were expressly excluded from the agreement. They now seek to recover commissions on premiums paid to the Alliance by those persons who, through the medium of the agreement between the receiver and the Alliance, have acquired new insurance protection.

Petitioners have no right and never had any right to any such commissions any more than they would have any rights to any commission if each policyholder-creditor had taken his pro rata share in cash and bought insurance with it from the Alliance or any other company without petitioners' aid, because they are not now and never were agents of the Alliance; they had nothing to do with the arrangements for the new protection obtained from the Alliance; the only premiums received by the Alliance were for new insurance (the Alliance could not receive premiums for policies issued by the Peoria Company, since that company had no policies, no assets, and no life after November 15, 1933); and petitioners' agency contracts with the Peoria Company provided for commissions only in premiums paid to the Peoria Company in cash (R. 7). (No premiums could be paid to the Peoria Company after November 15, 1933.)

There is no basis for petitioners' contention that there was no liquidation because there was no sale for money of all the Peoria company assets. "In determining fairness the court may, in cases like the instant one, accept appraisal values instead of resorting to liquidation through sales, etc." (*Daniel* v. *Layton*, 75 F. (2d) 135, 137.) There is nothing in law or equity which precludes a creditor from taking his pro rata share in kind rather than in cash following a forced sale. Such a forced sale would depress the recoverable value of the assets, thereby increasing the loss

already sustained. It became the duty of the receiver and the Director of Insurance to utilize the assets for the best interests of the creditors of the insolvent Peoria Company. The Supreme Court of Illinois has clearly stated the equity of the position in the opinion (376 Ill. 523, 524, R. 334) now attacked by petitioners:

> "In view of the difficulty of realizing the utmost possible from those assets by a sale thereof, the difficulty or impossibility of policyholders, who had grown older, to secure other insurance, and for many other practical reasons, it was the judgment of the circuit court, that those assets could best be applied to a reinsurance contract. Those policyholders who wished to have their portions of the assets so applied concurred in the reinsurance agreement, and it was their assets and their future payments which were applied to that purpose. Policyholders not wishing to concur in the reinsurance plan were not required to do so, but were paid in cash their *pro rata* share of their respective equities in their respective policies. No agent contributed in any way to this reinsurance contract and there was no lien or claim of any agent which could impair the receiver's duty to purchase for the policyholders as much insurance as such policyholder's share of assets would buy for him."

The proceedings at all stages have been prosecuted under the statute of Illinois directing the liquidation of delinquent insurance companies. The rights of petitioners were fixed by that statute pursuant to the liquidation decree of November 15, 1933, not by the decree of August 22, 1934, here complained of. Each Illinois court in passing on their claims has so held.

The petitioners have been accorded due process of law at every stage when their rights were being determined, and their rights have at all times been fully preserved.

Conclusion.

The judgment of the Supreme Court of Illinois attacked by the petition presents no substantial federal question and no conflict of decisions or question of public importance. Therefore, it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Donald R. Richberg,
D. I. Jarrett,
George Z. Barnes,
George W. Hunt,
David J. Kadyk,
Attorneys for Alliance Life Insurance Company.

Ferre C. Watkins,
Howard White,
Attorneys for Timothy W. Swain, Receiver.